

**United States Department of Labor
Employees' Compensation Appeals Board**

EDWARD E. DONOHUE, Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Butte, MT, Employer**

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**Docket No. 04-1742
Issued: August 3, 2005**

Appearances:
Edward E. Donohue, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
A. PETER KANJORSKI, Alternate Judge

JURISDICTION

On July 29, 2004 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated April 1, 2004, finding that he received an overpayment in the amount of \$4,641.32 and that he was at fault in the creation of the overpayment. The Office ordered appellant to repay the overpayment in full. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$4,641.32 during the period December 2, 2002 through May 17, 2003; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

FACTUAL HISTORY

On December 21, 1988 appellant, then a 47-year-old forester, filed an occupational disease claim alleging that his depression was caused by factors of his federal employment.

Appellant stopped work on November 23, 1988. On June 27, 1989 the Office accepted appellant's claim for depression.

On July 18, 1996 appellant accepted the employing establishment's offer of employment as a forester, which became effective July 21, 1996. Despite a transitional work schedule, appellant was allowed to work as he felt appropriate. On November 20, 1996 Dr. Smith, a Board-certified psychiatrist, removed appellant from his full-time work duties, which had become effective November 24, 1996, until after January 4, 1997. Appellant did not return to work. On May 9, 2002 the employing establishment offered appellant the position of forester which the Office found suitable. On May 20, 2002 appellant advised the employing establishment that he had initiated the process for retirement. On June 25, 2002 the Office found the offered position unsuitable since it was no longer available at the employing establishment.

On October 2, 2002 appellant advised the Office that he was going to elect retirement benefits from the Office of Personnel Management (OPM). The Office responded that it would send him an election form which provided, among other things, that he was not entitled to receive benefits under the Federal Employees' Compensation Act and the Civil Service Retirement System/Federal Employees' Retirement System concurrently except for a schedule award. The Office advised appellant to report when his retirement benefits began as soon as possible. The Office further advised that he should submit the election form immediately to avoid an overpayment.¹

In a letter dated April 22, 2003, appellant requested that the Office remove his name from its system for benefits checks. By letter dated May 6, 2003, appellant's wife, Mary Jean Donohue, asked the Office to provide a comparison between receiving workers' compensation benefits versus Civil Service Retirement benefits.

On May 14, 2003 the Office received an election form signed and dated by appellant on May 6, 2003. Appellant elected to receive OPM retirement benefits effective December 2, 2002. By letter dated May 21, 2003, the Office advised OPM about appellant's election. The Office requested that OPM submit a check in the amount of \$10,840.01 as reimbursement for compensation paid to appellant from December 2, 2002 through May 17, 2003 because appellant elected to retroactively receive retirement benefits during this period.

Beginning August 1, 2003, OPM deducted \$600.00 a month from appellant's annuity check to collect the debt for the Office. In a November 17, 2003 letter, the Office requested that OPM reduce the withholding of \$600.00 from appellant's annuity check by \$200.00 a month and forward \$400.00 to the Office. Later, in a letter dated December 16, 2003, the Office advised OPM that an overpayment issue needed to be further developed prior to any further deductions being made from appellant's monthly payments. The Office requested that the \$600.00 deduction or any amount to repay the overpayment be stopped immediately until further notice.

¹ The Office informed appellant that a loss of wage-earning capacity determination would proceed despite his retirement election. By decision dated January 24, 2003, the Office reduced appellant's compensation effective January 26, 2003, on the grounds that the selected position of retail store manager represented his wage-earning capacity.

By letter dated February 12, 2004, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of \$4,641.32. The Office found that he received compensation from December 2, 2002 through May 17, 2003, in the amount of \$10,041.32. The Office noted that thus far it had received \$5,400.00 in payments from OPM towards this debt which left a balance of \$4,641.32. The Office further noted that OPM had been asked to cease making any further annuity deductions to repay the debt at that time. The Office found that appellant was at fault in the creation of the overpayment because he should have known at the time he made his informed election to receive an OPM annuity in lieu of compensation benefits under the Act that the receipt of both benefits was prohibited. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On March 22, 2004 appellant submitted a completed Form OWCP-20 which indicated that his monthly income consisted of \$240.00 in social security benefits and \$2,408.00 in other benefits which totaled \$2,648.00. He listed monthly expenses which included \$625.00 for rent or mortgage, \$800.00 for food, \$50.00 for clothing, \$200.00 for utilities, \$260.00 for assorted medical expenses, \$210.00 for prescriptions and \$250.00 for other unidentified expenses totaling \$2,395.00. He further indicated that he had other monthly expenses which included \$310.00 for a bank loan and \$300.00 for student loans totaling \$610.00. Regarding his funds, appellant stated that he had \$50.00 cash on hand, \$600.00 in his checking account and \$200.00 in his savings account totaling \$850.00. He also noted that he possessed stocks and bonds. Appellant contended that he never thought he was “due” an overpayment. He stated that documentation established that he took extraordinary steps to avoid an overpayment and that creation of the overpayment was the Office’s fault due to its incompetence.

By decision dated April 1, 2004, the Office finalized the preliminary determination regarding the fact of overpayment, the amount of the overpayment and finding of fault. The Office ordered appellant to repay the overpayment in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, *he may not receive salary, pay, or remuneration of any type from the United States, except --*

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;

(3) *other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death....*” (Emphasis added.)²

ANALYSIS -- ISSUE 1

The Office properly paid appellant wage-loss compensation during the period December 2, 2002 through May 17, 2003. An overpayment was created because appellant elected to receive OPM retirement benefits effective December 2, 2002, but as noted wage-loss compensation was paid from December 2, 2002 through May 17, 2003. The record establishes that appellant received \$10,840.01 in wage-loss compensation. From this amount, \$5,400.00 was reimbursed to the Office by OPM, leaving an unpaid balance of \$4,641.32. Therefore, the Board finds that appellant received an overpayment in the amount of \$4,641.32.³

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that an overpayment of compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁶ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁷

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”⁸

² 5 U.S.C. § 8116(a).

³ The Board notes that none of the exceptions provided in section 8116(a) of the Act applies in the instant case.

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁸ 20 C.F.R. § 10.433(a).

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."⁹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. To establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payments were incorrect.¹⁰

In determining whether appellant was at fault in the creation of the overpayment, the Office found that he accepted a payment, which he knew or should have known to be incorrect. The record establishes that appellant did not elect to receive OPM benefits until May 14, 2003, but that these OPM benefits were retroactive to December 2, 2002. There is no indication that, when appellant was receiving the wage-loss compensation payments, which was months before his May 2003 election of OPM benefits, he knew or should have known that he was not going to be entitled to them. It was not until May 2003 that he learned of his OPM disability. Therefore, the Board finds that the Office erred in finding appellant at fault in creating the overpayment.¹¹

Since it has been determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act,¹² if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹³ The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$4,641.32 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

⁹ *Id.* at § 10.433(b).

¹⁰ *Diana L. Booth, supra* note 7.

¹¹ *See Joseph Jimenez*, Docket No. 98-1494 (issued June 19, 2000).

¹² 5 U.S.C. § 8129(b).

¹³ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$4,641.32 during the period December 2, 2002 through May 17, 2003. The Board, however, finds that the Office improperly found that appellant was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2004 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment. The decision is set aside with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 3, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

A. Peter Kanjorski, Alternate Judge
Employees' Compensation Appeals Board